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IN THE

Supreme Court of the United States

NO. 72-474

MARY ELLEN SCHATTMAN, *Petitioner*

v.

THE TEXAS EMPLOYMENT COMMISSION, ET AL,
Respondents

PETITION FOR REHEARING

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Now comes Mary Ellen Schattman, Petitioner, Pro Se, and files this her Petition for Rehearing of this Court's denial of her Petition for a Writ of Certiorari, January 8, 1973. Petitioner would show the Court that it erred in denying her Petition for a Writ of Certiorari for the following reasons.

First, on January 9, 1973, the Fourth Circuit Court of Appeals sitting *en banc* reversed the panel decision in *Cohen v. Chesterfield Co. Sch. Bd.*, 467 F.2d 262 (4th Cir. 1972), aff'g 326 F.Supp. 1159 (E.D. Va. 1971). While eliminating one of the decisions in conflict with the Fifth Circuit's opinion in this case, the action of the Fourth Circuit illustrates the division of opinion among judges at all levels of the federal judiciary concerning the

scope of protection afforded to pregnant government employees by the Fourteenth Amendment's equal protection clause. Having first determined to follow the Sixth Circuit's decision in *LeFleur v. Cleveland Bd. of Edu.*, 465 F.2d 1184 (6th Cir. 1972), the Fourth Circuit abruptly reversed itself.

A clear statement of the law and the applicable Fourteenth Amendment standard is necessary to remove any doubt from the minds of the judges and to alleviate the anxiety of working women whose income is critical to their families' wellbeing.

Second, in the intervening decision of *Perez v. Gomez*, No. 71-575, January 17, 1973, this Court held that Texas had violated the rights of illegitimate children by failing to provide a means to establish paternity and enforce the obligation of support. No matter how difficult, Texas is obligated to provide an opportunity in every case to prove paternity. The administrative inconvenience of requiring individual evaluation and treatment of pregnant Texas employees is considerably less onerous than the obligation of individual treatment imposed by *Perez*.

It is interesting to note that in the District of Columbia, Congress has provided that blind and otherwise physically disabled persons be treated equally and with dignity in regard to employment, "unless it is shown that the particular disability prevents the performance of the work involved." P.L. 92-515 §4, October 21, 1972.

Third, the Court's denial of certiorari in this case has created an anomaly which should not go uncorrected. Respondent has interpreted this Court's decision to mean that the termination of employment at the end of the

seventh month of pregnancy, without a hearing or consideration of the individual's ability to work, is "reasonable" and not prohibited by the Fourteenth Amendment. Houston Chronicle, Sec. 5, p. 4, January 10, 1973. Apparently, the Respondent does not believe that it is bound by the Equal Employment Opportunity Commission's new pregnancy regulations, 29 CFR §1604.10(b), despite Congress' expansion of Title VII to include all state agencies. 42 U.S.C. §2000e(a), P.L. 92-261, March 24, 1972. Under the new regulations private employers are required to treat disability due to pregnancy or childbirth like any other temporary disability, and must permit the pregnant employee to work so long as she is able. Yet, under Respondent's interpretation, state agencies remain free to terminate employees at the end of the seventh, or other "reasonable," month of pregnancy. This is completely contrary to the broad Congressional policy against discrimination in state personnel practices. *See*, 42 U.S.C. §2000e, et seq, as amended March 24, 1972, and the Intergovernmental Personnel Act, P.L. 91-648, January 5, 1971. Judicial action has created this inconsistent treatment of public and private employers and employees, and this Court should act to eliminate that inconsistency.

Fourth, in reaching its decision on the "reasonableness" of Respondent's policy, the Court of Appeals relied heavily upon the testimony of Dr. McCauley, but failed to distinguish between his personal preferences and his medical opinion. He preferred to work with women who were not "susceptible" to pregnancy, with persons who were " 'neuters' . . . you know, 'its'," meaning women who had had hysterectomies. On the other hand, he acknowledged that pregnant women could and did work

and, that in the past he had certified his patients' ability to work until term for their employers.

This reliance upon the personal bias of a witness whom the appellate court had not seen is inappropriate where the trial court found that the Respondent had no factual medical basis for its policy and that the only reason for the policy's continued existence was the inertia of history. 330 F.Supp. 328, 329. This finding was certainly sufficient to carry Petitioner's burden of proof under 42 U.S.C. §1983 and the Fourteenth Amendment.

Fifth, it is inconceivable that this Court would be so sanguine as to permit a state agency to summarily fire a black employee on the sole ground that he had contracted a potentially debilitating disease—sickle cell anemia. Yet that is what has happened here—this Court has declined to review a judgment which permits a state to discriminate against its female citizen-employees under the guise of a classification based on the physical properties possessed by one sex. *Compare, Sprogis v. United Air Lines,* 444 F.2d 1194, 1198 (7th Cir. 1971), a Title VII case.

This Court's failure to face the issue of the rights of pregnant women has created a very real threat of economic blackmail. The United States Air Force thought nothing of asking Captain Struck to multilate her body to retain her commission by submitting to an abortion. Where abortion is legal, it is not unreasonable to expect both public and private employers to resort to this kind of pressure. It will be especially effective where the woman's threatened income is essential to her family's financial security. The right to have offspring is a basic human right. *Skinner v. Oklahoma,* 316 U.S. 535, 536 (1942). The Respondent's policy violates this basic right by re-

quiring a woman to choose between her child and her job. Its policy is as irrational as the Air Force's policy in Captain Struck's case, as the policy in *LeFleur*, supra, and as a policy which would predicate the continued employment of a male with prostate trouble upon castration.

In our culture, it does not reflect badly on a wife to "let" her husband work with prostatitis, but husbands are very sensitive about "letting" their wives work while pregnant. Surely we have left the Victorian Era when husbands treated their wives like children. Women are adults, capable of recognizing their capabilities and following a physician's advice.

If it is true that women become so incapacitated during pregnancy that they cannot do their work, then women whose sole job is housework and the care of children must be similarly incapacitated. Yet no agency demands or provides "protection" for these women who perform one of the most strenuous jobs in the country. Women are allowed to scrub floors or clean clothes for free during pregnancy, but not for money. It is not the doing of the job that is prohibited, but the doing of it for hire. In short, a pregnant woman can be a slave but not an employee.

A woman, even a pregnant woman, is a person with individual abilities, defects, needs and desires. She is not a box of film stamped "Do not use after September 1st." There is nothing magical about the eighth month of pregnancy that enfeebles a capable healthly woman. I ask no favor, no preference, only that I be judged on my abilities and treated for what I am—an individual.

Petitioner prays that her Petition for Rehearing be granted and that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the

Fifth Circuit entered in this proceeding on March 1, 1972, as amended, rehearing denied, June 5, 1972.

Respectfully submitted,

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I certify that this Petition is filed in good faith and not for purposes of delay.

MARY ELLEN SCHATTMAN